JUN 30 1972

No. 71-1169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MOBIL OIL CORPORATION,
Petitioner,
v.
CARL F. MATZEN, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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June 30, 1972

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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PETITION FOR REHEARING

Mobil Oil Corporation, petitioner herein, respectfully petitions this Court for rehearing upon the order entered on June 7, 1972,[1] denying the petition for writ of certiorari and moves this Court for an order (1) vacating the order of June 7, 1972, and (2) granting the petition.

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[1] Mr. Justice Douglas was of the opinion that certiorari should be granted; Mr. Justice Stewart and Mr. Justice Powell took no part in the consideration or decision of the petition. The same order was entered in companion cases: Amoco Production Co. v. Waechter, *et al.*, No. 71-1179; Cities Service Oil Co. v. Matzen, *et al.*, No. 71-1188; Shell Oil Co. v. Matzen, *et al.*, No. 71-1191; and Federal Power Commission v. Mobil Oil Corporation, *et al.*, No. 71-1326.

1. The Decision In *Federal Power Commission* v. *Louisiana Power & Light Co., et al.*, Nos. 71-1016, *et al.*

On June 7, 1972, this Court entered its decision in *Federal Power Commission* v. *Louisiana Power & Light Co.*, —— U.S. —— (Nos. 71-1016, *et al.*, Oct. Term 1971).

The Court there decided issues of Federal Power Commission jurisdiction under the Natural Gas Act over allegedly "non-jurisdictional" activity; affirmed the Commission's assertion of jurisdiction; and noted, with apparent approval, steps by the Commission to cope with a shortage of natural gas.

That decision underscored the reasons the petition should be granted in the instant case; highlights the divergence between this Court's analysis and decisional process in interpreting the Natural Gas Act and the erroneous analysis and interpretation by the Court of Appeals in the instant case; and takes note of compelling reasons, equally applicable in the instant case, for reversing a Court of Appeals opinion which had construed Commission authority far too narrowly and had failed to accord weight to Commission objectives in its exercise of jurisdiction in the face of a national shortage of natural gas.

In the *LP&L* case, the principal question was whether the Commission had jurisdiction to regulate curtailment of direct sales of natural gas. In the instant case, the principal question is whether the Commission has jurisdiction over the rate for the "royalty" interest in jurisdictional sales of natural gas for resale. In *LP&L*, an opinion by the Court of Appeals for the Fifth Circuit departing from principles controlling construction of the Natural Gas Act was reversed; but in the instant case, an equally erroneous opinion by the Court of Appeals for the District of Columbia Circuit would be left standing. This Court's opinion in *LP&L* is a step-by-step index to the errors below:

(1) This Court first noted reports of the national shortage of natural gas, the remaining committed re-

serves of 259.6 trillion cubic feet, and Commission efforts to conserve that supply (*LP&L*, slip op., pp.4-5 and n.2); but in the instant case, the court below would permit between 12.5% and 25% of that volume to pass out of Commission rate control and out of the framework of the area rate structures now designed to cope with the very same emergent shortage recognized as the genesis of the orders reviewed in *LP&L;*

(2) This Court reiterated that "FPC regulation was to be broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare" (*LP&L*, slip op., p. 9); but in the instant case, the court below has overturned a Commission effort to close exactly that type of gap in control of rates for 12.5% to 25% of the total volume now sold in interstate commerce in fields of production;

(3) This Court relied upon the controlling principle that ". . . in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs" (*LP&L*, slip op., p. 10); but in the instant case, this principle was not followed below;

(4) This Court in *LP&L* made express detailed inquiry into whether there was a "gap" and whether state regulatory authority could reach the acts in question (*LP&L*, slip op., pp. 11-12); but in the instant case, this required test in reviewing the Natural Gas Act was disregarded below, *even though this Court already has held that the very rates, sales, and volumes in question are not within permissible state control, but could be reached only by federal authority;*[2]

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[2] Compare the *LP&L* decision, the opinion below in the instant case, and *Northern Natural Gas Co.* v. *State Corp. Commission of Kansas*, 372 U.S. 82 (1963), and *State Corp. Commission of Kansas* v. *Cities Service Gas Co.*, 361 U.S. 836 (1959).

(5) This Court in *LP&L* again cautioned that there must be an "inquiry into the necessary consequences" of a contention that the FPC is without jurisdiction, and canvassed the disruption of interstate commerce and federally-protected interests that could flow from "contradictory regulation" (*LP&L*, slip op., pp. 10-14); but in the instant case, the Commission's findings and conclusions as to such disruptive effects were brushed aside and given no weight;

(6) This Court in *LP&L* meticulously reviewed the legislative history of the Natural Gas Act and particularly the indicia of Congressional intent that no "gaps" were intended and that practical, effective Commission control was intended despite state classifications (*LP&L*, slip op., pp. 14-20); but in the instant case, the Natural Gas Act was construed *without a single reference in the opinion to the legislative history of the statute;*

(7) This Court in *LP&L* gave attention to the position of consumer interests and consumer states as pertinent to questions of intended reach of the Natural Gas Act and of necessity for FPC action (*LP&L*, slip op., pp. 12-14); but in the instant case, the court below brushed aside expressions on behalf of such interests and failed to note that the position on jurisdiction asserted there (and now here) by Mobil and by the Commission was supported by all parties representing the interests of consuming states and ultimate consumers of natural gas.[3]

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[3] Before the Commission, Mobil's position as to necessity for the Commission's *continued* exercise of jurisdiction over the rates for the royalty interests thus was supported by the Commission's Staff, The People of the State of California and The Public Utilities Commission of the State of California, and the "Eastern Distributor Intervenor Group" consisting of Brooklyn Union Gas Company, Consolidated Edison Company of New York, Inc., Long Island Lighting Company, Orange and Rockland Utilities, Inc., Philadelphia Electric Company, Philadelphia Gas Works, Division of The United Gas Improvement Company, and Public Service Electric and Gas Company (see Mobil Appendix, pp. 87-88; 48, 52).

(8) This Court in *LP&L* reached a conclusion consistent with the touchstone for interpreting Congressional intent as to proper Commission reach under the Natural Gas Act (slip op., p. 19):

> "Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible the Congress desired regulation by federal authority rather than non-regulation. *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 18 (1962)."

In the instant case, all of these steps and controlling criteria for construction of the Natural Gas Act were applicable. Yet, they have not been observed. Therefore, all of the reasons this Court found in *LP&L* for a reversal of the Court of Appeals and for affirmation of Commission jurisdiction are reasons the petition in the instant case should be granted. In *LP&L*, this Court also quoted its recognition that in natural gas producer rate regulation, " 'the width of administrative authority must be measured in part by the purposes for which it was conferred . . . Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.' *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); see *United Gas Pipe Line Co.* v. *Federal Power Commission*, 385 U.S. 83, 89-90 (1966)." (*LP&L*, slip op., p. 21).

In contrast to those views of this Court, the opinion below in the instant case would stand as an aberration opening a "gap" Congress clearly meant to close. In contrast to the views expressed below, this Court also recently reiterated (1) that such concepts as "title" under "ordinary" property law are *not* controlling in application of federal law;[4] (2) that a federal regulatory agency's

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[4] Compare *Fuente, et al.* v. *Shevin*, —— U.S. —— (Nos. 70-5039, *et al.*, June 12, 1972) and the opinion below (Mobil App., p. 24).

assertion of authority may be sustained where clearly and "reasonably ancillary" to effective performance of the agency's regulatory responsibilities;[5] and (3) that in review of agency action, "necessity" for action and agency objectives, particularly in the face of a shortage of a given service, must be given great weight.[6]

Only review by this Court now can make possible the application of these principles and those applied in *LP&L* to the important questions of construction of the Natural Gas Act at issue in this case, which affect all sales in interstate commerce of natural gas for resale.

2. Disruption of Commission Area Rate Regulation In The Face of A Shortage of Natural Gas

In the petition in the companion case No. 71-1326, the Solicitor General, on behalf of the Commission, advised this Court that unless ". . . overturned, the decision below will significantly inhibit the Commission from effectively regulating the rates at which such gas is sold." (Pet., No. 71-1326, p. 8).

The Solicitor General also called attention to the parallel between the instant case and the jurisdiction issues in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954);[7] and correctly stated:

> "If royalty owners are now entitled to royalties based on the 'market value' of natural gas as in-

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[5] *United States* v. *Midwest Video Corporation*, —— U.S. —— (No. 71-506, June 7, 1972), citing *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

[6] *United States* v. *Allegheny-Ludlum Steel Co.*, —— U.S. —— (No. 71-227, June 7, 1972).

[7] Significantly, this Court denied the petitions for writs of certiorari in *Phillips*, but upon petitions for rehearing, granted rehearing and granted the petitions (see 346 U.S. 896 and 347 U.S. 672); and ultimately affirmed on the merits as to existence of Commission jurisdiction.

terpreted by state or federal courts or state regulatory authorities, the owners would in many instances receive compensation in excess of the royalty component allowed in the area rates determined by the Commission. The Commission would then be required either to let producers absorb the increased royalty obligations or to adjust area rates upward to accommodate the higher payments, thereby causing consumers to pay higher prices for natural gas. In short, the Commission's control over one significant component in the establishment of area rates would be lost." (Pet., No. 71-1326, p. 12, fn. omitted).

Significantly, if this Court's order of June 7, 1972 stands, the process of so unraveling all of the Commission's existing area rate decisions must begin and continue in the Courts of Appeals during the remaining months of 1972. All such FPC decisions rest on the now reversed exercise of Commission jurisdiction over the royalty rate, and all of these decisions would have to be remanded and reconsidered as to more than 60% of the gas now moving in interstate commerce:

(1) On June 12, 1972, briefs were filed necessarily seeking such a remand in Texas Gulf Coast Area Rate Cases (PSC of NY v. FPC), Nos. 71-1828, *et al.*, D.C. Cir.;

(2) Before oral argument in October, 1972, such a remand must be sought in Southern Louisiana Area Rate Case (Placid Oil Co. v. FPC) No. 71-2761, Fifth Circuit, in which the last briefs were filed in May, 1972;

(3) Briefs now under preparation must seek such a remand in Other Southwest Area Rate Case (Shell Oil Co. v. FPC), Nos. 72-1114, *et al.*, Fifth Circuit; and

(4) Appropriate pleadings also must be filed in Hugoton-Anadarko Area Rate Case (People of the State of California v. FPC), No. 71-1036, Ninth Circuit, in which oral argument was had on May 11, 1972.

None of these disruptions need occur, if, as the Commission advises, the clearly erroneous opinion below were reversed.

In *LP&L*, this Court so noted and stopped a severe disruption of Commission efforts to cope with the natural gas shortage at the "service" ends of pipelines, but in this instance, a more far-reaching disruption of the Commission's program would occur at the "supply" end of the pipelines in all fields of production. Commission and industry efforts to conserve, dedicate, and commit funds to increasing exploration and development for supplies to meet increasing, unmet demand would be undermined by diversion of funds to pay soaring "market values" on royalty interests in existing sales, as announced by myriad courts. Neither consumer, producer, pipeline, nor distributor interests in adequate service, adequate supply, and reasonable rates can be advanced by such results.

The practical effects of a reversal of the Commission, so carefully assessed in *LP&L*, therefore should be considered by this Court in the instant case and fully warrant the granting of the petition. Clearly, the process indicated in *LP&L* for review of Commission objectives and impact of reversal was not followed below in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

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June 30, 1972

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

/s/ _____

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